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Appellant's Brief 1976-SC-0253

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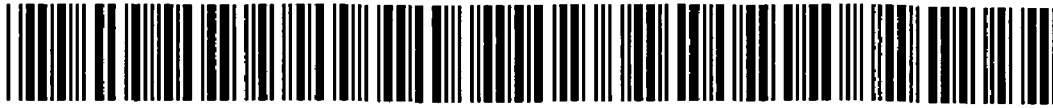
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**KYSC1976-SC-0253-01**

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# **APPELLANT'S BRIEF**

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# SUPREME COURT OF KENTUCKY

File No. 76-253

---

**JAMES B. GUTHRIE** - - - - - **Appellant**

*versus*

**SELMA T. GUTHRIE** - - - - - **Appellee**

---

**AN APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE THOMAS W. HINES, JUDGE**

---

## BRIEF FOR APPELLANT

# FILED

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Copies of this Brief have been served in accordance with RAP 1.250 and CR 5.02 upon the trial judge, Honorable J. David Francis, and upon counsel for the Appellee, Honorable G. D. Milliken.

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## TABLE OF CONTENTS AND AUTHORITIES

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	PAGE
Statement of the Question Presented.....	ii
Statement of the Case.....	1- 3
The Proceedings . . . . .	3- 5
Argument—The Award to Respondent For Maintenance Was Excessive and Not Supported by the Evidence . . . . .	5-11
KRS 403.200 . . . . .	5- 6
<i>Bell v. Bell</i> , Ky., 494 S. W. 2d 517 (1973) . . . . .	6
<i>Colley v. Colley</i> , Ky., 460 S. W. 2d 821 (1970) . . . . .	6, 6-7
<i>Budig v. Budig</i> , Ky., 481 S. W. 2d 95 (1972) . . . . .	6
KRS 403.250 . . . . .	8
Conclusion . . . . .	11-12

### **STATEMENT OF THE QUESTION PRESENTED**

Did the Circuit Court err in awarding to the Respondent maintenance that was excessive and not supported by the evidence?

**YES.**

# SUPREME COURT OF KENTUCKY

File No. 76-253

---

JAMES B. GUTHRIE        -        -        -        -        *Appellant*

*v.*

SELMA T. GUTHRIE        -        -        -        -        *Appellee*

---

AN APPEAL FROM WARREN CIRCUIT COURT,  
HONORABLE THOMAS W. HINES, JUDGE

---

## BRIEF FOR APPELLANT

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*May it please the Court:*

### STATEMENT OF THE CASE

The Petitioner-Appellant, James B. Guthrie, and the Respondent-Appellee, Selma T. Guthrie (herein referred to as James and Selma), were married on November 8, 1941 in Franklin, Kentucky. A son was born to this marriage, James, Jr., and Selma had a daughter by a former marriage, who was later given the name of Guthrie. At the time of their marriage, James worked at Hollinger's Hatchery and Selma worked at an overall factory. From October, 1942 until 1968, the parties moved to various places where James was sta-

tioned in the armed forces, and off and on, Selma would return home until James settled in his various assignments. Off and on, Selma would work, and when they returned to Kentucky between assignments, a son was born. At this time, Selma did not work, but assumed the duties of wife and mother. The last assignment was in Japan, and upon their return to the United States, the parties took up residence in Georgia, where Selma worked with Avon until James' retirement. Thereafter, they returned home to Scottsville (Transcript, Vol. II, pp. 295-297).

The parties purchased a home in Scottsville, Kentucky for \$6,500.00 and the deed was made to both parties. In addition to their home, James purchased two parcels of land in Florida. One parcel contained two lots for which they paid \$6,000.00, the other parcel contained two lots for which they paid \$2,400.00. The property is now worth \$7,000.00 (Transcript, Vol. II, pp. 297-8).

The parties also acquired during the course of their marriage, various household items, an automobile, and three life insurance policies: one \$1,000 policy paid up and in the possession of the Petitioner, one \$1,000.00 policy paid up and in the possession of the Respondent, and one \$10,000.00 policy held by the Petitioner, but designating Selma and her children as beneficiaries (Transcript, Vol. II, p. 298).

Prior to their marriage, Selma owned a fourth interest in some property in Allen County, Kentucky. This was a farm consisting of about 60 acres that she jointly shared with her family. She has derived some

income from that farm (Transcript, Vol. I, pp. 25-6; 31-2; 41). James brought to the marriage some personal clothing, and possibly some small items of furniture (Transcript, Vol. I, p. 74).

### **THE PROCEEDINGS**

In March of 1974, James filed for a dissolution of their marriage. (This was a point of argument throughout, for he maintained that he wanted a complete divorce, and Selma stated that it was agreed that they get a separation because of future widow benefits from the Army.) (Transcript, Vol. I, p. 21, pp. 44-48). This first filing was in Allen County, Kentucky. Subsequently, James hired another attorney in Bowling Green, Kentucky, and again filed for dissolution of marriage, this time on the 22nd of November, 1974. Selma answered this petition, stating that they had entered into an agreement on the settlement of their property rights and had agreed on a legal separation, but that thereafter James had breached his agreement. For her counterclaim, she asked that Court that in the event there should be a final divorce granted, she wanted alimony and property settlement in a lump sum sufficient to pay her a pension for the remainder of her life in the event she should survive James and thus would be protected against the loss of her pension (Transcript, Vol. I, pp. 1-2, 12-15). After proof was taken in the case and various orders were entered, a Findings of Fact, Conclusions of Law and Decree was handed down by the Warren Circuit Court on De-



cember 1st, 1975, where it confirmed the division of the proceeds of the property by the parties, made a ruling on which items each party could take, and finally directed James to pay one-half of his retirement and one-half of his social security each month AND convey the real estate in Florida in lieu of the amount she would get under the medical rights which would be lost (according to the Court) upon dissolution of marriage. Subsequent to this Judgment, James filed a motion to amend the Judgment, pointing out to the Court certain errors as to the amount of money he was receiving, as to Selma's ability to work, as to the disposition of the property and agreement between the parties, and as to the excessiveness of the award of maintenance. He submitted a Memorandum of Law showing how the Court was in error in its finding that Selma could not work. Rather, James showed the Court that Selma had worked in the past, and was even working some at the time that they separated. In addition, James pointed out to the Court how he had undergone three operations and was physically unable to do any gainful employment; that he had no other source of income except his retirement and social security. James also showed the Court other errors which are not in issue here. But the real issue, that of the excessiveness of the award of alimony and maintenance, was brought to the Court's attention at this time. James pointed out in his memorandum that he had paid for the home and pieces of Florida property, items while abroad, insurance policies and the auto-

mobile. He showed that he is presently disabled for any gainful employment and must rely on his retirement and social security for income. He showed the Court that Selma had an income from the property that she jointly owned with her family, that she worked during their marriage, including the time they separated, and is able to supplement her maintenance by some source of income. Thereafter, James' motion to amend was overruled (Transcript, Vol. II, pp. 294-310).

Subsequent to this Order, James filed a Notice to Appeal (Transcript, Vol. II, p. 311) and a Motion asking the Court to lower the maintenance ordered due to a change in circumstances warranting the ordered provisions as unconscionable. He submitted a supporting memorandum and several exhibits to prove his position (Transcript, Vol. II, pp. 311-344). However, an Order was entered directing him to pay the one-half of retirement and social security, as ordered before (Transcript, Vol. II, p. 345). From this final order and preceding ones, James appeals.

### **ARGUMENT**

**The Circuit Court's Award of Maintenance to the Respondent Was Excessive and Not Supported by the Evidence.**

The rights of a wife, and now the husband, regarding maintenance are now fully explained in KRS 402.200. "Sufficient estate of her own" is now replaced by "reasonable needs". This statute authorizes

the Court to order maintenance to either spouse and make two findings: that the spouse seeking maintenance 1) lacks sufficient property to provide for his or her reasonable needs, and 2) is unable to support himself or herself through appropriate employment. (There is a custodial provision here which will not be considered since it is not applicable in this case at bar.) Further, the amount of maintenance shall be based on "as the court deems just, and after considering all relevant factors including" 1) financial resources, 2) time to acquire education or training to find appropriate employment, 3) standard of living during marriage, 4) duration of marriage, 5) age, physical and emotional condition of spouse seeking maintenance, and 6) ability of paying spouse to meet his needs while meeting those of the spouse seeking maintenance.

The major premise of KRS 403.200 seems to be based on "need". It contemplates a balance between need of the paying spouse and need of the receiving spouse. *Bell v. Bell*, Ky., 494 S. W. 2d 517 (1973); *Colley v. Colley*, Ky., 460 S. W. 2d 821 (1970) and *Budig v. Budig*, Ky., 481 S. W. 2d 95 (1972), with the statutory language of the new dissolution statute KRS 402.200 (2) (a) and (f) "ability of the spouse . . . to meet his needs" demonstrates that it is reasonable to conclude that a major factor in determination of the amount of maintenance is the *total estate of the husband* irrespective of source and the total estate of the wife, likewise. *Budig*, *Supra*, reinforces *Colley's*

Supra, interpretation of "ability" in that a husband's ability to support himself arises from all the property he has. "Reasonable needs" means those of the individual involved considering prior economic and social position.

Considering the above statutes and case law, let us now examine their applicability to the case at bar. The two findings that the statute KRS 403.200 authorizes the trial court to make in considering maintenance (providing reasonable needs and ability to support herself through appropriate employment) in the case at bar were either not considered or were misrepresented. The trial court did err in awarding Selma *more* than was necessary to provide her for her "reasonable needs". Also, the record shows that Selma worked in the past during their marriage and also was working at the time they separated.

Undoubtedly, the trial court failed to consider all relevant factors in determining the amount of maintenance. The six factors that were enumerated hereinabove can be analyzed thusly: 1) financial resources. The Court apparently considered these. 2) time to acquire education or training to find appropriate employment. The Court apparently did not consider this, for the record disclosed that Selma worked, was working at the time of the separation, and can now work. She previously did factory work and worked with Avon cosmetics; therefore she is already trained to do some line of work. 3) standard of living during marriage. Apparently the Court considered this. 4) dura-

tion of marriage. The Court considered this. 5) age, physical and emotional condition of spouse seeking maintenance. We think that the Court placed too much emphasis on this factor, for in its findings of fact not only did it state that the Petitioner was in poor health (which he is) but it found the Respondent to be in poor health, too. It is a well known fact that divorce is an unpleasant event which subjects the parties to extraordinary stresses and upsets, and while it is understandable that Selma is suffering from such stress and upset as is evidenced by her physician's report (Transcript, Vol. I, p. 137), the Court was not justified in finding her in such poor health as to preclude her from any gainful employment. 6) ability of paying spouse to meet his needs while meeting those of the spouse seeking maintenance. It is this factor that the Court particularly failed to consider. James attempted to demonstrate to the Court his inability to meet the requirements of the original Judgment. He sought a modification on the grounds that the provisions of the maintenance were unconscionable, even showing circumstances so substantial and continuing as to make the original terms unconscionable pursuant to KRS 403.250. James explained to the Court that he was having tremendous expenses due to past operations and a possible future operation, along with numerous expenses. He attached several exhibits in support of this position (Transcript, Vol. II, pp. 319-344). His monthly expenses were charted as follows:

**MONTHLY EXPENSES**

1. AMERICAN NATIONAL . . . . .	\$ 150.00
2. Parking fee for trailer . . . . .	45.00
3. Utilities . . . . .	45.00

---

MONTHLY FIXED EXPENSES . . . . . 240.00

4. Sears . . . . .	100.00
	<hr/>
	340.00

1. Food (store bought) . . . . .	100.00
eat out 4 times per week	
(72 x 4 = \$8 x 4.3 = 34.50) . . . . .	34.40
2. Gas (2 trips to Nashville per month) . . . . .	20.00
(in town) . . . . .	20.00
3. Medicine . . . . .	18.00

---

VARIABLE EXPENSES . . . . . 192.40

TOTAL OF FIXED AND  
VARIABLE EXPENSES . . . . . \$532.40

Veterans Pension + 799.69

Social Security + 174.00

---

973.69 = clears each month

400.00 = pay to wife

---

573.69 = clearing now each  
month

CLEAR NOW A MONTH \$573.69

TOTAL EXPENSES 532.40

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41.29 left over

The case law referred to hereinabove discusses the interpretation of "ability" to be a husband's ability to support himself arising from all the property he

has. What does James have? He has his retirement pension and social security ( $\$799.69 + \$174.00 = \$973.69$ ). He lives in a trailer park, has the usual expenses of utilities, food, gas and medicals (these are excessive). He has a paid up  $\$1,000.00$  life insurance policy and some personal effects. He received one-half of the net proceeds from the sale of their home in Scottsville, Kentucky. He must pay out  $\$400.00$  per month maintenance, therefore, considering what he draws a month ( $\$973.69$ ) and what his fixed and variable expense each month ( $\$573.69$ ), then he is left with  $\$41.29$  which is hardly enough to sustain himself.

But what about Selma? She receives  $\$400.00$  maintenance and lives in a nice apartment complex. She was awarded along with this maintenance, the *entire* Florida real estate to rely upon for income after the death of James. She received one-half of the net proceeds from the sale of their home, received a  $\$1,000.00$  paid up life insurance policy, and is the beneficiary of a  $\$10,000.00$  life insurance policy. She got the automobile and household goods, furniture and her personal effects and all the remaining property left in her possession at the time of the separation. It might be well to add here that some of the items left in her possession at the time of the separation were items that James and Selma bought overseas. One, a Jade incense burner, the son found listed in *Grumps* (an antique catalog) to be worth  $\$17,000.00$  (Transcript, Vol. I, p. 194)! When questioned on the whereabouts of this particular item and others, Selma stated that she did not know,

that it "had been lost" or "taken by someone" but that she didn't report the loss to either the police or insurance company (Transcript, Vol. II, pp. 263-266). Also, in 1959 and 1960, the Florida real estate was purchased for \$3,000.00. The Court found that it is now \$7,000.00.

Closely scrutinizing what each party has in the way of "needs" and "abilities to support", it is easily seen that Selma was favored by the Court, contrary to the evidence.

### CONCLUSION

James is not trying to evade his responsibility to Selma. All he is asking the Court to do is to determine a maintenance that is fair and in harmony with the evidence. He cannot work, he is disabled, he has had three surgeries and will need more, possibly. His only source of income is his retirement and social security. Selma is able to do some work and had received a substantial award from this dissolution with which to meet her "reasonable needs".

To award half of James' retirement and social security AND all of the Florida property, in view of what other things Selma has to sustain her, this Judgment was excessive. A portion of the retirement and social security and/or half of the Florida property would be more in line with the evidence.

WHEREFORE, the Appellant, James B. Guthrie, prays that this Court will reverse with directions to re-



determine the maintenance provisions in light of *all* relevant factors, as supported by the uncontroverted evidence.

Respectfully submitted,

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